BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Blue Casa Communications, Petition for Declaratory Ruling That, Pursuant to the Carve-Out Provisions of 47 U.S.C. § 251(g), Interstate Originating Switched Access Charges, Not Reciprocal Compensation Charges, Apply to ISP-Bound Calls That Are Terminated via VNXX-type Foreign Exchange Arrangements	))))))))	**WC Docket No. 09-8**

@ COMMUNICATIONS, INC. COMMENTS ON REQUEST FOR DECLARATORY RULING

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EXECUTIVE SUMMARY

The Petition completely lacks any meaningful description of how the LECs involved typically exchange the traffic Blue Casa describes as "virtual NXX-type foreign exchange arrangements" and claims is and always was subject to the "access charge regime." But the subject cannot be addressed unless both physical interconnection and routing are taken into account. The Petition does not explain how Virtual CO codes work or how they are used to support ISPs' needs to intercommunicate with the PSTN. Blue Casa does not explain whether it would want the requested declaratory ruling to impact existing interconnection agreements. Petitioner does not even try to explain what criteria it thinks should be used to determine where the ISP is "physically located" in order to then decide whether the ISP is "in the same local calling area as the other party." And Blue Casa most definitely does not at all demonstrate with any reasonable specificity how or that any of this could possibly fit in to the Commission's access charge rules under Part 69 or current access tariffs. The Petition is woefully inadequate because the broadly-stated question it asks would cover far more than a single "controversy." Answering the question as asked would not at all "remove uncertainty."[1] To the contrary it would only generate more controversies and create more uncertainty because the industry would not know what kinds of arrangements were covered and which arrangements were not covered.

The technical facts completely undercut Blue Casa's request. The arrangements between LECs that support the calls in issue were put in place after the 1996 amendments to the Act. The method of providing service through so-called "Virtual CO codes" by competitive carriers did not exist in 1996. It is practically impossible to come up with rational and all-encompassing "rules" or criteria for determining where the ISP is "physically located" for purposes of deciding whether a call is "local" or "non-local." The way the two LECs interconnect cannot be fit into

[1] *But see* 47 C.F.R. § 1.2.

any recognizable switched access service. The way the two LECs jointly collaborate to provide PSTN connectivity to an ISP cannot be fit into any recognizable switched access service. The closest fit – and it is a really bad fit, but it is the closest – is jointly provided Feature Group A. The bad news for Blue Casa, however, is that under that arrangement Blue Casa would be the open end provider and it would be responsible for billing the ISP, collecting its share of the access revenues and then remitting the remainder to the other LEC or LECs that were also involved so they could get their share.

While Blue Casa says it wants the Commission to confirm that the traffic in issue was always subject to the access regime – and therefore is preserved by the § 251(g) "carve out" to § 251(b)(5) – that is not really what they are asking the Commission to do because none of this can legitimately be shoehorned into Feature Group A, Feature Group B, Feature Group C or Feature Group D as those access arrangements have been configured since the late 1980s. The access tariffs and rules would have to be changed to implement any decision, and this fact is the best evidence that none of this was ever subject to § 251(g) or the access regime. What Blue Casa really wants is to recover originating charges from a peer LEC using some access rate level, but to do so as part of § 251(a), (b)(5) or (c)(3) interconnection. The law does not allow that result.

The Petition should be denied.

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@ COMMUNICATIONS, INC. COMMENTS ON REQUEST FOR DECLARATORY RULING

@ Communications, Inc. ("@ Com") hereby submits its comments on Blue Casa's Petition for Declaratory Ruling pursuant to the Public Notice of Pleading Cycle.[2] @ Com is a CLEC that offers telephone exchange and exchange access service in the state of North Carolina. @ Com will demonstrate that the Petition should be denied.

I. Technical discussion of LEC-LEC interconnection, Foreign Exchange service, Virtual CO codes, service to ISPs and access charge arrangements.

A. What is foreign exchange service?

Blue Casa starts out with the assumption that the traffic it describes is "foreign exchange" ("FX") service under federal law. But the Petitioner does not cite to a federal definition of FX. Instead, they refer to a California Public Utilities Commission case finding that something called a "dedicated prefix" arrangement is a type of FX.[3] The Commission has never adopted this definition. The federal definition of FX is old, but has never changed, and it does not comprehend what Blue Casa describes.

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[2] Public Notice, *Blue Casa Communications, Petition for Declaratory Ruling That, Pursuant to the Carve-Out Provisions of 47 U.S.C. § 251(g), Interstate Originating Switched Access Charges, Not Reciprocal Compensation Charges, Apply to ISP-Bound Calls That Are Terminated via VNXX-type Foreign Exchange Arrangements*, DA 09-467, WC Docket No. 09-8, (rel. Feb. 25, 2009).

[3] Petition, pp. 5-6.

> Foreign exchange (FX) is a private line service that is partially "switched". It allows a businessman located in one state to, in effect, maintain a local phone in another state. Under FX, for example, a businessman in Washington can be reached by telephone subscribers in New York City and can himself reach New York City telephone subscribers (through a local loop in Washington, a Washington-New York interchange line, and a business line in the New York City exchange area). However, New York City telephone subscribers could not reach Washington subscribers other than the Washington businessman over FX private line service and the latter would have to maintain a separate telephone in order to tie into the Washington exchange area.[4]

The Commission has mentioned "Virtual CO codes"[5] in some decisions. And, it has indicated that the service that competitive carriers offer to their users with this convention is "FX-like" or "FX-type" service.[6] But the FCC has never held that access charges apply. The intercarrier compensation that should apply was the subject of two prior requests for comments in 2001 and 2005[7] in the long-running but never ending *Intercarrier Compensation* rulemaking,[8] but no final decision has ever been made.

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[4] Decision, *In the Matters of Bell System Tariff Offerings of Local Distribution Facilities for Use By Other Common Carriers; and Letter of Chief, Common Carrier Bureau, Dated October 19, 1973, to Laurence E. Harris, Vice President, MCI Telecommunications Corp.*, FCC 74-457 ¶ 7, note 5, Docket No. 19896, 46 F.C.C.2d 413, 418 (rel. Apr. 1974); *see also Bell Tel. Co. v. FCC*, 503 F.2d 1250, 1254, not 4 (3d Cir. 1974); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 496 F.2d 214, 216, note 5 (3d Cir. 1974).

[5] This is a misnomer. The number is indeed a CO code and there is nothing about it. But @ Communications will nonetheless use this nomenclature since that is what the Commission itself has used.

[6] "Virtual NXX" service to ISPs was a major issue in contention in the *Starpower Damages Order*, MO&O, *In the Matter of Starpower Communications, LLC v. Verizon South, Inc.*, File No. EB-00-MD-19, FCC 03-278, 18 FCC Rcd 23625; 2003 FCC LEXIS 6245 (rel. Nov. 2003). The subject was also arbitrated before the FCC in MO&O, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket Nos. 00-218, 00-249 00-251, DA 02-1731 ¶¶ 286-30317 FCC Rcd 27039, 27176-21782 (Wireline Comp. Bur. 2002). In both of those cases the decision was that Virtual CO code usage is subject to reciprocal compensation/ISP and is <u>not</u> some form of access traffic that allows the originating LEC to recover access charges.

[7] NPRM, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 01-132, ¶ 115, note 188, 16 FCC Rcd 9610, 9652 (rel. Apr. 2001), FNPRM, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 05-33, ¶ 41, not 124, 20 FCC Rcd 4685, 4706 (Mar. 2005). The 2005 FNPRM characterized "virtual FX" as ***<u>non-access</u>*** traffic.

There is at present no FCC precedent that the technical arrangement Blue Casa complains about "is" or "should be" treated like traditional *interstate* FX for intercarrier compensation purposes. To the contrary, the Commission has tended to look at how the originating carrier rates the call by its end user for retail purposes: if the originating carrier treats the call as "local" and uses the two phone numbers for retail rating, then the call will also be treated as subject to § 251(b)(5).[9]

From a technical perspective, traditional foreign exchange service is a "line side" connection at the "open end." It resembles a basic exchange service arrangement, or an old-style PBX trunk.[10] The connection is not at a tandem. The "open end" gives access to the local calling area associated with the end office switch and then there is a private line that runs to and through a distant end office and then to the customer's premise.

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[8] The FNPRM issued in November, 2008 mentioned virtual CO codes during the discussion of "assessable numbers" in the Universal Service portion, but did not ask what intercarrier compensation rules should apply. This FNPRM did reaffirm that originating charges are not permissible under §§ 251(b)(5) and 252(d)(2). Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, *High Cost Universal Service Reform; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Service*s, CC Docket Nos. 96-45, 99-200, 96-98, 01-92, 99-68, WC Docket Nos. 05-337, 03-109, 06-122, 04-36, FCC 08-262, 2008 FCC LEXIS 7792 (rel. Nov. 5, 2008) ("*Order Answering Mandamus and FNPRM*").

[9] Before the November 2008 Order responding to the D.C. Circuit's mandamus order, the Commission had said that "ISP-bound" traffic was not subject to § 251(b)(5), but it also consistently held it was "non-access" traffic for intercarrier compensation purposes.

[10] The earliest versions of FX and CCSA applied the single line business or PBX trunk rate for the open end component:

> Currently, subscribers to interstate FX service pay a charge for the private line linking their premises to the central office at which the line terminates in the foreign exchange (the "open end") determined by the appropriate AT&T Tariff. They also pay charges to the foreign exchange carrier determined by the business line rate under its local service tariff. …

MO&O, *In the Matter of MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, FCC 84-36, ¶ 99, note 46, 97 F.C.C.2d 834, 865 (rel. Feb., 1984) ("*Access Charge Reconsideration Order*").

When the Commission began designing switched access charges to "OCCs" as part of the replacement of the old "ENFIA"[11] arrangements and because of the AT&T Divestiture, it provided a useful explanation of "FX" arrangements. Many in the industry today do not realize that "FX" was the original way that MCI entered the telecommunications market, and it used basic line-side connections to do so:

> 51. This Commission determined in 1971 that the public interest would be served by permitting companies other than the traditional telephone and telegraph carriers to offer interstate telecommunications services as common carriers and that telephone companies would be required to provide such other carriers (or "OCCs") with "local distribution" facilities. AT&T subsequently refused to provide MCI with connections to local telephone company switches to enable MCI to provide Foreign Exchange ("FX") service and Common Control Switching Arrangements ("CCSA") service to its customers because it claimed that our *Specialized Carrier* decision did not authorize MCI to provide those services. This Commission ordered AT&T to provide such facilities. Open end access for FX and CCSA services and local exchange service are provided through "lineside" connections to a local switch while "trunkside" connections are used for MTS trunks. MCI designed a service called Execunet that used line side connections to provide a service that is switched at both ends. This Commission's decision holding that MCI was not authorized to provide such an "MTS-WATS equivalent service" was reversed in *MCI Telecommunications Corp v. FCC, 561 F.2d 265 (D.C. Cir. 1977), cert. denied, 434 U.S. 1040 (1978)* (*"Execunet I"*).
>
> 52. MCI paid the telephone companies the same rates for MTS-WATS equivalent access that FX and CCSA customers paid for open end access while the *Execunet I* litigation was in process. We instituted this rulemaking proceeding a few weeks after the Supreme Court denied a petition for writ of certiorari in the *Execunet I* case. The proceeding was designed in part to determine the access charges that should be paid for MTS-WATS equivalent services.
>
> 53. Shortly after we instituted this proceeding AT&T filed a tariff that would have established access charges for the MTS-WATS equivalent services of the OCCs that were much higher than the FX-CCSA open end access charges the OCCs had been paying. AT&T claimed that the charges were computed to establish parity with the access compensation that it paid for MTS and WATS access through the settlements and division of revenues processes. The OCCs contended that the tariff should be rejected because it would create unlawful discrimination between charges for MTS-WATS equivalent access and the charges for identical access arrangements that were provided to FX and CCSA customers. The OCCs also claimed that the proposed charge did not establish an

[11] ENFIA charges were "per line" and were not usage sensitive; this was one of the major changes between ENFIA and the switched access charges that replaced ENFIA.

> adequate differential for qualitative differences between the interconnection arrangements for MTS and WATS and the interconnection arrangements that were provided for the MTS-WATS equivalent services and that the abrupt and drastic increase in their access costs would destroy emerging competition in interstate telecommunications services.
>
> 54. That tariff never became effective. AT&T deferred the effective date in order to conduct negotiations with the OCCs under FCC auspices to develop an interim formula for access charges for MTS-WATS equivalent services. AT&T, GTE and some of the OCCs entered into an agreement, commonly known as the ENFIA agreement, which did establish such an interim formula. That agreement provided that the formula would be used until this Commission or the Congress establishes a system of access charges or until the fifth anniversary of a Commission order approving the ENFIA agreement. This Commission adopted such an order on April 15, 1979. At about the same time we adopted a *Supplemental Notice* reaffirming our commitment to establish a system of access charges for all interstate and foreign services in this docket.
>
> 55. After issuing some further supplemental notices and receiving several rounds of comments relating to access charges and other subjects, this Commission adopted the *Access Charge Order.* That *Order* included rules for the computation of access charges for MTS-WATS equivalent services that would replace the ENFIA charges. In the meantime AT&T and the OCCs had conducted intermittent negotiations in an effort to develop OCC access arrangements that would more closely match the access arrangements that are used for MTS and WATS. Although no agreement was reached, AT&T did introduce alternatives known as ENFIA B and C that provide some but not all of the additional features that are provided for MTS or WATS access. The original FX type of access arrangement is now known as ENFIA A.[12]

B. What is Feature Group A?

As part of the move from "ENFIA" to "access charges" the technical arrangement originally used by MCI – ENFIA A – became known as Feature Group A. The Commission also found that the "open end" of FX service uses "local exchange switching in the same manner as local exchange service" and is different from the way that Feature Groups B and D use local exchange switching.[13]

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[12] MO&O, *In the Matter of MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, FCC 84-36, ¶¶ 51-55, 97 F.C.C.2d 834, 852-854 (rel. Feb. 1984) (notes omitted).

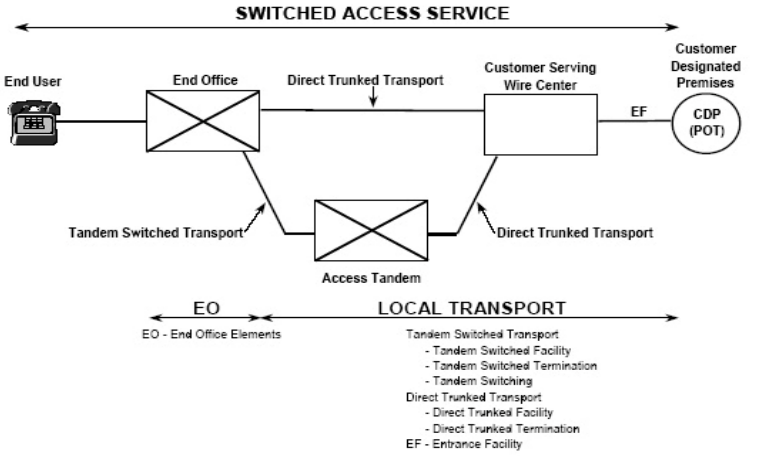
[13] Third Report and Order, *In the Matter of MTS and WATS Market-Structure*, CC Docket No. 78-72, Phase I, FCC 82-579, ¶ 51, note 20, ¶¶220-221 93 F.C.C.2d 241, 257-258, 305 (rel. Feb. 1983) ("*Access Charge Order*").

Blue Casa is therefore somewhat correct when it says on page 4 that "interstate FX" has always been part of the access charge regime, but what they omit is that the specific access arrangement involved is Feature Group A. The "FX" Blue Casa mentions, however, is not what competitive carriers have, offer or use in order to provide "Virtual CO code" based service to ISPs. From a technical perspective the arrangement does not match any of the existing Feature Groups. We shall start with Feature Group A since that is how interstate FX is provided, and will use the NECA tariff as the source for specific verbiage.

NECA FCC No. 5, § 6.1.3 provides a pictorial generic representation of the access charge rate elements:

6.1.3 Rate Categories (Cont'd)

The following diagram depicts a generic view of the components of Switched Access Service and the manner in which the components are combined to provide a complete Access Service.



In order to gain access to the local exchange, the IXC will obtain the end office elements, and then use direct trunked or tandem switched transport to the wire center that connects to the IXC POP via an entrance facility. Since Blue Casa is complaining about calls from its end users that are addressed to ISPs, we are discussing what Blue Casa would say is originating access, and the end office on the left side of the diagram is Blue Casa's end office.

As noted, "interstate FX" is provided through Feature Group A. NECA's "Description and Provision of Feature Group A" says, in pertinent part:

> 6.5.1 Description
> (A) FGA Access, which is available to all customers, provides line side access to Telephone Company end office switches with an associated seven digit local telephone number for the customer's use in originating communications from and terminating communications to an Interexchange Carrier's Interstate Service or a customer – provided interstate communications capability. The customer must specify the Interexchange Carrier to which the FGA service is connected or, in the alternative, specify the means by which the FGA access communications is transported to another state. Special Access Services utilized for connection with FGA at Telephone Company designated WATS Serving Offices as set forth in Section 7. following may be ordered separately by a customer other than the customer which orders the FGA Switched Access Service for the provision of WATS-type services. Special Access Services are ordered as set forth in 5.2 preceding.
>
> (B) FGA Switching is provided at all end office switches. At the option of the customer, FGA is provided on a single or multiple line group basis and is arranged for originating calling only, terminating calling only, or two-way calling which are specified by the customer's order for service.
>
> (C) FGA provides a line side termination at the first point of switching (dial tone office). The line side termination will be provided with either ground start supervisory signaling or loop start supervisory signaling. The type of signaling is at the option of the customer.
>
> …
>
> (E) A seven digit local telephone number assigned by theTelephone Company is provided for access to FGA switching in the originating direction. The seven digit local telephone number will be associated with the selected end office switch office switch and is of the form NXX-XXXX. If the customer requests a specific seven digit telephone number that is not currently assigned, and the Telephone Company can, with reasonable effort, comply with that request, the requested number will be assigned to the customer.
>
> …
>
> (J) Except as provided for in Section 6.1.3(A)(1), following, FGA will be provisioned over an (C) Entrance Facility from the customer's premises to the customer's serving wire center. FGA service, when used in the originating direction, will be provisioned as Direct Trunked Transport from the first point of switching (i.e., the end office switch where FGA switching dial tone is provided) to the customer's serving wire center.

Three points are important from this discussion. First, Feature Group A comes with a telephone number from the "first point of switching" or "dial tone office" – which would be Blue Casa's end office switch. But Blue Casa's whole complaint is that the number is assigned by the other carrier. Second, the connection is "line side" – meaning it is a regular POTS termination; the connection is not on the "trunk side." Third, when the dial tone office is not the serving wire center for the IXC POP, then there is a dedicated connection (*e.g.*, common transport is not used) from the first point of switching that goes to another LEC wire center, and then there is an entrance facility to the IXC POP. The importance of these last two points will be addressed below when the actual arrangements in place between the LECs involved in handling the calls is presented.

C. What are Feature Groups B and D?

Feature Group B is a "trunk side" arrangement, and it can be provided at either an end office or a tandem. It too, however, comes with a number. NECA's description of Feature Group B provides, in pertinent part:

> 6.6.1 Description
>
> (A) FGB Access, which is available to all customers, provides trunk side access to Telephone Company end office switches with an associated uniform 950-XXXX access code. FGB trunk side access is provided for the customer's use in originating communications from and terminating communications to an Interexchange Carrier's Interstate Service or a customer provided interstate communications capability. The customer must specify the Interexchange Carrier to which the FGB service is connected or, in the alternative, specify the means by which the FGB access communications is transported to another state. Special Access Services utilized for connection with FGB at Telephone Company designated WATS Serving Offices as set forth in Section 7. following may be ordered separately by a customer other than the customer which orders the FGB Switched Access Service for the provision of WATS or WATS-type services. Special Access Services are ordered as set forth in 5.2 preceding.
>
> (B) FGB, when directly routed to an end office (i.e., provided without the use of an access tandem switch), is provided at appropriately equipped Telephone Company electronic end office switches. When provided via Telephone Company

designated electronic access tandem switches, FGB switching is provided at Telephone Company electronic and electromechanical end office switches.

(C) FGB is provided as trunk side switching through the use of end office or access tandem switch trunk equipment. The switch trunk equipment is provided with wink start start-pulsing signals and answer and disconnect supervisory signaling.

(D) FGB switching is provided with multifrequency address signaling in both the originating and terminating directions. Except for FGB switching provided with the automatic number identification (ANI) or rotary dial station signaling arrangements as set forth respectively in 6.10.1(F) and 6.10.2(A) following, any other address signaling in the originating direction, if required by the customer, must be provided by the customer's end user using inband tone signaling techniques. Such inband tone address signals will not be regenerated by the Telephone Company and will be subject to the ordinary transmission capabilities of the Local Transport provided.

(E) The access code for FGB switching is a uniform access code. The form of the uniform access code is 950-XXXX. A uniform access code(s) will be assigned to the customer for the customer's domestic communications and another will be assigned to the customer for its international communications, if required. These access codes will be the assigned access numbers of all FGB switched access service provided to the customer by the Telephone Company.

(F) The Telephone Company will establish a trunk group or groups for the customer at end office switches or access tandem switches where FGB switching is ordered. When required by technical limitations, a separate trunk group will be established for each type of FGB switching arrangement provided. Different types of FGB or other switching arrangements may be combined in a single trunk group at the option of the Telephone Company.

And then there is Feature Group D:

6.8.1 Description

(A) FGD Access, which is available to all customers, provides trunk side access to Telephone Company end office switches. Special Access Services utilized for connection with FGD at Telephone Company designated WATS Serving offices as set forth in Section 7. following may be ordered separately by a customer other than the customer which orders the FGD Switched Access Service for the provision of WATS or WATS-type services. Special Access Services are ordered as set forth in 5.2 preceding.

(B) FGD is provided at Telephone Company designated end office switches whether routed directly or via Telephone Company designated electronic access tandem switches. The Telephone Company will designate the first point(s) of switching for FGD services where the Telephone Company elects to provide equal access through a centralized equal access arrangement. Those Telephone Company offices providing equal access through centralized arrangements are

identified in NATIONAL EXCHANGE CARRIER ASSOCIATION, INC. TARIFF F.C.C. NO. 4.

(C) FGD is provided as trunk side switching through the use of end office or access tandem switch trunk equipment. The switch trunk equipment is provided with wink start start-pulsing signals and answer and disconnect supervisory signaling.

(D) FGD switching is provided with multifrequency address signaling or out of band SS7 signaling. With multifrequency address signaling and SS7 signaling, up to 12 digits of the called party number dialed by the customer's end user using dual tone multifrequency or dial pulse address signals will be provided by Telephone Company equipment to the customer's premises where the Switched Access Service terminates. Such address signals will be subject to the ordinary transmission capabilities of the Local Transport provided.

…

(F) The Telephone Company will establish a trunk group or groups for the customer at end office switches or access tandem switches where FGD switching is provided. When required by technical limitations, a separate trunk group will be established for each type of FGD switching arrangement provided. Different types of FGD or other switching arrangements may be combined in a single trunk group at the option of the Telephone Company.

(G) The access code for FGD switching is a uniform access code of the form 101XXXX. A uniform access code(s) will be the assigned number of all FGD access provided to the customer by the Telephone Company. No access code is required for calls to a customer over FGD Switched Access Service if the end user's telephone exchange service is arranged for presubscription to that customer, as set forth in 13.4 following. Where no access code is required, the number dialed by the customer's end user shall be a seven or ten digit number for calls in the North American Numbering Plan (NANP). For international calls outside the NANP, a seven to twelve digit number may be dialed. The form of the numbers dialed by the customer's end user is NXX-XXXX, 0 or 1 + NXX-XXXX, NPA + NXX-XXXX, 0 or 1 + NPA + NXX-XXXX, and, when the end office is equipped for International Direct Distance Dialing (IDDD), 01 + CC + NN or 011 + CC + NN. When the 101XXXX access code is used, FGD switching also provides for dialing the digit 0 for access to the customer's operator, 911 for access to the Telephone Company's emergency reporting service, or the end-of-dialing digit (#) for cut-through access to the customer designated premises.

(H) FGD switching will be arranged to accept calls from telephone exchange service locations without the need for dialing the 101XXXX uniform access code. Each telephone exchange service line may be marked with a code to identify which 101XXXX code its calls will be directed to for interLATA service.

Feature Groups A and B therefore have unique telephone numbers associated with the service that users dial to reach the IXC's network. Feature Group D uses dial around (101XXXX)

as a prefix to the regular telephone number the end user is trying to reach via telephone toll, or the user's line has been presubscribed to automatically associate the line with a particular 101XXXX code when the user attempts to make a toll call.

Originating access traffic addressed to the 10-digit number used for Feature Group A goes to the dial tone office. The call is switched at the end office and placed on the dedicated line which runs to the IXC's POP. Originating traffic to the 950-XXXX number associated with Feature Group B will also be switched, but it can be delivered to the IXC POP over either common or dedicated transport. With Feature Group D (either dial around or recognized through presubscription), the end office will also use common or dedicated transport. Feature Groups B and D operate by recognizing the call attempt as related to a particular IXC based on Carrier Identification Code or CIC and the originating LEC then knows how to route the call along to the IXC's POP.[14]

D. What is the physical interconnection arrangement and routing that is actually in use?

1. LEC to LEC.

Blue Casa does not expressly say so, but it is likely they use commercial agreement based ILEC switch ports combined with § 251(c)(3) UNEs to provide local service. In other words, Blue Casa probably does not have its own end office switch and its own physical interconnection to other LECs. This has some significance because it allows one to draw some inferences regarding how Blue Casa's end users originate calls and how those calls ultimately get to the

[14] *See* NECA Tariff No. 5 § 2.6 (Definitions): "Carrier Identification Code (CIC). The term "Carrier Identification Code (CIC)" denotes a numeric code assigned by the North American Numbering Plan (NANP) Administrator for the provisioning of Feature Group B or Feature Group D Switched Access Services. The numeric code is unique to each carrier and is used by the Telephone Company to route switched access traffic to the Customer Designated Premises."

ISP: the physical interconnection arrangement is the one the competitive carrier serving the ISP has in place with the ILEC, and calls are routed to the ILEC's switch.[15]

Most competitive carriers interconnect with ILECs through one or more POIs, and then the two carriers will derive trunking that goes to each of the tandems in a LATA. On occasion direct end office trunking will be employed where the two carriers exchange high volumes of traffic between two particular end offices. All of the connections are "trunk side"; all tandem ports are trunk ports by definition and direct end office trunks are, well, trunks, so they go on the trunk side too. This is not "line side" interconnection.

When Blue Casa's end user dials the Virtual CO code number assigned to the ISP by its competitive carrier, the dial tone office will determine that the number is not associated with the dial tone office, and the switch intelligence will scour one or more databases to determine the LEC that holds the number (including thousands block and porting) and obtain routing instructions from the LERG. The LEC that holds the number is identified by a "carrier code" but it is an OCN, not a CIC, that is used.[16] The dial tone office begins the process of connecting the call to the tandem or uses a direct trunk. The two end offices will communicate via SS7 and establish a path.

The Virtual CO code provider will connect the call to the ISP's system, which will answer the call and the session will begin. The ISP will then begin to communicate with the user's modem and the authentication server will validate the user. Once this occurs, the user will be "on the Internet."

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[15] If Blue Casa has its own class 5 switch, then it will likely subtend an ILEC tandem and connect to all other non-ILEC carriers through that tandem. The ultimate result will be the same.

[16] The North American Numbering Plan (NANP) local routing information in the Local Exchange Routing Guide (LERG) and Business Integrated Routing & Rating Database System (BIRRDS) databases map a telephone number prefix to an Operating Company Number (OCN). The OCN is the unique identifier of the LEC or CMRS provider that has received the telephone number prefix.

2. LEC to LEC interconnection is not an access arrangement.

There is not any reasonable way to characterize the physical arrangements that exist between LECs under §§ 251 and 252 as an access arrangement. The means by which the LECs interconnect is different than any switched access feature group. The ordering is different. The provisioning is different. The interfaces are different. The carrier codes are different. The two LECs are peers and co-carriers and neither of them is the "customer" of the other. Interconnection is a statutory duty and one carrier is not providing a service to the other when they interconnect. While "transport and termination" might fairly be characterized as a service, origination is not. That is one of the reasons the Commission has correctly recognized several times – including in its November, 2008 *Order Answering Mandamus and FNPRM* – that an originating LEC cannot impose charges on another LEC for originating traffic. This principle has been in the rules since 1996.[17]

Blue Casa wants a declaration that Virtual CO code arrangements are subject to exchange access and always have been. But that cannot be so. Access tariffs are the vehicles by which the legacy charges carved out by § 251(g) have always been implemented. There is no possible way one can credibly claim the originating LEC is actually providing Feature Group A, B, C or D service to the LEC that is providing the Virtual CO Code service to an ISP. The tariffs' technical descriptions simply cannot be stretched to cover the technical and operational situation. The tariffs would have to be amended to cover the situation. If § 251(g) has always covered Virtual CO code service then there would have to be a tariff vehicle and there is not. Implementing any declaration that access applies going forward would require significant access tariff amendments to cover the situation and the technical arrangements that are in place. That alone demonstrates

[17] *See* 47 C.F.R. §§ 51.703(b), 51.709(b).

that this traffic was not subject to access in 1996. Anything that was not access in 1996 is covered by § 251(b)(5) as a matter of law.

3. Where is the ISP?

i. Virtual CO code based service allows affordable and competitive dial up Internet service in non-metropolitan areas.

Blue Casa and those who support imposing access on Virtual CO codes used to provide dial up Internet will make much of the "physical location" of the ISPs and argue that the ISP is not "in" the same local calling area as the calling party. To the extent this matters or is true, there are good reasons for this and society benefits from the result, particularly in small towns and rural areas. Dial-up calling is only cost-effective for the customer if the cost of the call is not time sensitive. So if there were no "local" ISP numbers, users would be deprived of the benefits of affordable Internet access that the vast majority of Americans enjoy. So the relevant question becomes one of method. How can an ISP establish a local presence? What can an LEC do to facilitate this?

Dial-in modem facilities today are provided using digital interfaces into digital central office switches. That is a requirement of the V.90 modem protocol; server-side modems with analog interfaces are limited to 33.6 kbps, while digital interfaces can go up to 53 kbps. In addition, as a practical matter, only digital interfaces of DS1 or larger make any sense for an ISP. These go into a Remote Access Server (RAS), which integrates the modem and access-router functions. While small (one-PRI) RAS systems exist, it is generally more economical and easier to manage larger ones; current high end systems can support thousands of modems in a single cabinet that fits into a quarter of a standard rack. It is unrealistic for an ISP to rent closets behind drugstores in small towns in order to put a dozen analog modems with "local" phone numbers,

when a Virtual CO code based service allows modern high-performance RAS equipment to be installed in a proper ISP server environment.

In a typical environment, the data bandwidth to the retail ISP data center is roughly 1/10 to 1/15 of the ISDN PRI or channelized T1 PSTN bandwidth going in to the RAS, because the average modem uses only 4,000-6,000 bps during a session. An ISP Point-of-Presence might thus have a T1 of data bandwidth going back to the ISP for every 200-350 modems. And a typical ISP will provision one modem for every 8-15 subscribers, depending on average usage. So a PoP needs to have, say, 1,600 to 5,000 dial-up subscribers just to make efficient use of the first T1 of Internet bandwidth. An ISP will typically, however, provision at least two T1 circuits, for redundancy, or use a high-bandwidth data transport service such as ATM (which is generally not available, at least at reasonable cost, in rural areas). This sets the parameters for what could realistically be considered a minimum-sized Access ISP. ISPs typically operate this type of setup in rural areas, using several Virtual CO codes for multiple local calling areas to aggregate sufficient territory and volume.

Some local calling areas are too small to sustain a physically local ISP on this basis. Should an ISP be expected to rent real estate in each town and village or rate center simply to provide “local” service when, at no additional cost to the originating LEC, the ISP can collocate at a regional PoP in a nearby metropolitan area? There are significant additional costs involved to establish a local presence in every rate center where there are or might be customers. This cost must be passed on to customers, or the ISP will simply not offer service in rural areas.

Allowing local calling but centralized operations therefore makes affordable Internet access more available to small towns, expands competitive choices for users, and costs everyone involved (the ILECs, the competitors, the ISPs, the individual users, and ultimately society as a

whole) much less. Blue Casa's position would punish users, reduce choice and raise consumer prices. The only dial up service that will be available would be that of the captive ISP affiliate of the incumbent.

ii. There are no easily administrable criteria for geolocating the ISP for rating purposes.

If for some reason we are to play "find the ISP" and establish an "actual physical location" so as to make a rating determination then there must be some rules on the criteria to be used and the facts will be pertinent to the exercise. What is the ISP's "premises" for example? Is it the business office? Is it where the equipment is? What if the ISP has equipment in multiple locations, for example the RADIUS[18] operates in one place but the RAS[19] is somewhere else? What if there are two RADIUS or authentication servers being used[20] and they are in different local calling areas? What if the ISP has multiple RAS in different local calling areas? Is the ISP "physically located" for rating purposes in one, the other or all these places? What if for some reason the ISP happens to have a RAS in the "local" rate center for the originating caller but for some reason (due to technical difficulties or line busy and the system is designed to roll over to a different location or they use dynamic routing between multiple RAS for efficiency purposes) the call goes to a RAS in a different local calling area? Will we look to the spot where some piece of equipment sends an off-hook signal to the serving switch?

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[18] "Remote Authentication Dial In User Service." *See*, RFC 2865, "Remote Authentication Dial In User Service (RADIUS)," ©Copyright The Internet Society (2000), available at http://www.ietf.org/rfc/rfc2865.txt.

[19] RFC 2865 uses "Network Access Service" (NAS) instead of RAS, but the function is the same. *Id*., p. 3 ["A Network Access Server (NAS) operates as a client of RADIUS. The client is responsible for passing user information to designated RADIUS servers, and then acting on the response which is returned."]

[20] *Id.* ["A RADIUS server can act as a proxy client to other RADIUS servers or other kinds of authentication servers."]

What if the ISP has a PO Box in the local calling area? Assume the ISP is a sole proprietorship. In that case the owner "is" the ISP. Assume the owner happens to live in the "local rate center" but places her equipment elsewhere. When the owner is at home, is the ISP "physically located" in the local calling area?

If the Commission is going to go down this road it needs to provide some guidance on just what criteria and facts will be used to geolocate where the ISP "is physically located" for rating purposes.

II. The traffic described in the Petition is subject to § 251(b)(5) and LEC originating charges are not allowed under the Act.t

When two LECs jointly provide service to an Information Service Provider, then neither LEC is entitled to recover access charges from the ISP, and the LEC that transports and terminates a call to the ISP's platform from an end user on the PSTN can most certainly not demand access charges from the other LEC that is jointly handling the call. The Commission's recent decision in the *Order Answering Mandamus* resulting from the DC Circuit's mandamus order clearly – finally – holds that § 251(b)(5) has always applied to traffic that originates on the PSTN that is addressed to an ISP. The decision once again reaffirms that the ISP's "actual physical location" is irrelevant because it is merely an intermediate point of switching. The Commission should reject any attempts to "find" the ISP to determine if a call is "local." Not so long ago the ILECs were saying the ISP's location was irrelevant to whether a dial-up Internet access call was "local." Now they want to say the ISP's location is determinative. But they still completely miss the point: § 251(b)(5) does not turn on whether a call is "local" and it never has.

There was no pre-Act obligation relating to intercarrier compensation for ISP-bound traffic.[21] When one LEC serves an ISP and an originating LEC delivers the traffic for transport

[21] *Order Answering Mandamus* ¶15, 2008 FCC LEXIS 7792 *24.

and ultimate termination, then that traffic was *never* part of the access (§ 251(g)) regime and it *never* had any pre-Act obligation to pay access. It matters not at all if the ISP's "intermediate switch" is not physically located in the same "local calling area" as the calling party.

Blue Casa cites to *Northwestern Bell*[22] for the proposition that ISPs are required to pay access charges for "FX service." While that characterization of the decision is correct as far as it goes, Blue Casa conveniently ignores that the decision recognized that Talking Yellow Pages used an arrangement that was "functionally very similar" to FX but nonetheless held access charges did not apply notwithstanding the similarity.[23] As noted above, Virtual CO code based service is functionally similar to FX, but it is not FX. And access charges do not apply.

III. The LEC that provides PSTN connectivity to the ISP through Virtual CO codes is not acting as an IXC because it is not providing telephone toll service.

LECs provide "telephone exchange service" and "exchange access service." *See* § 153(16), (26) and (47). "Telephone toll service"[24] is not an LEC function but is instead an IXC function. When a carrier is providing LEC services then it is not acting as an IXC. When a carrier is providing telephone toll service then it is not acting as an LEC.

"Exchange access service" and "access rates" only apply under the Act when "telephone toll service" is involved. No other service is statutorily subject to exchange access charges and the Commission does not have the power or authority to mandatorily impose exchange access charges on any telecommunications service (or information service) other than "telephone toll service." There is nothing in the Act that comes close to allowing one LEC to require another

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[22] Memorandum Opinion and Order, *In the Matter of Northwestern Bell Telephone Company for Declaratory Ruling*, FCC 87-290, 2 FCC Rcd 5986 (rel. Oct. 1987). Blue Casa pinpoint cites to ¶29.

[23] 2 FCC Rcd 5986, ¶ 7 and note 9; 2 FCC Rcd at 5988, ¶ 20 and note 29.

[24] *See*, § 153(48) [TELEPHONE TOLL SERVICE.--The term "telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.]

LEC to become an exchange access customer under any circumstances. LECs assess exchange access charges only against IXCs and only when the IXC is providing "telephone toll service."

Blue Casa asserts on page 6 that the Virtual CO code provider is "effectively operating as a facilities-based interexchange reseller of foreign exchange service rather than as a CLEC…" Although the argument is a bit muddled,[25] we finally get to the nut of the problem. Blue Casa is saying Virtual CO code based services are "telephone toll," which is the only telecommunications service that is statutorily subject to the "exchange access" charges that were carved out of § 251(b)(5) by § 251(g). Blue Casa is arguing that the Virtual CO code provider is acting as an "IXC" and is not acting as an LEC. They are wrong.

In order to be "telephone toll service" under § 153(48) each of three criteria must be met. The service in issue must be "telephone service." It must be "between stations in different exchange areas." Finally, there must be "a separate charge not included in contracts with subscribers for exchange service."

The first criterion is met if you consider the Virtual CO code service as opposed to the Internet access service provided by the Virtual CO code service user. Blue Casa has not shown that the second is met. Blue Casa, for example, has not explained what a "station" is and it has not reasonably addressed how one can determine where each of the "stations" can be geolocated. More important, a "station" is an end-point for communications. That is where the call "ends." For jurisdictional purposes, however, ISP premises are not "stations" but are instead

[25] The "muddle" is that Blue Casa is saying that ***it*** is the foreign exchange service provider whose service is being resold. But Blue Casa is not providing foreign exchange service. (This is especially so if it is using the old UNE-P arrangement and has no network of its own and is for all intents and purposes "reselling" the ILEC's network.) It does not provide the telephone number or any facilities to the Virtual CO code service user nor does it provide any service or facilities to the Virtual CO code provider. Blue Casa is merely providing telephone exchange service to its own users by letting them make calls.

"intermediate points of switching or exchanges between carriers (or other providers)."[26] Therefore, although the call "terminates" at the ISP for purposes of § 251(b)(5) the ISP premise cannot be a "station." Blue Casa has not carried its burden of proof that the service it complains about involves service "between stations in different exchange areas." There may not, in fact, be two "stations." Under the current law there is likely only one "station."

Finally, Blue Casa has not shown that Virtual CO code service involves "a separate charge not included in contracts with subscribers for exchange service." Indeed, Blue Casa did not address whether there is a separate charge, and it did not explain its position on whether Virtual CO code service is or is not "exchange service." @ Communications suggests there is usually not any separate and additional charge and Virtual CO code service is an "exchange service."

"Exchange service" is not a statutorily defined term. But the FCC used that phrase before the 1996 amendments and it appeared in § 221(b) both before and after the 1996 amendments. And, the pre-1996 authority is that entities other than LECs can provide "exchange service." For example, CMRS providers are not LECs under the 1996 amendments but the Commission has long held that they provide "exchange service."[27] Therefore Blue Casa does not win merely by

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[26] Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Dkt. Nos.96-68, FCC-01-131, 16 FCC Rcd 9151 (rel Apr. 2001)("*ISP Remand Order*".

[27] *Public Notice*, 1 FCC 2d 830 (Adopted Sept. 1965); Public Notice, *FCC Policy Regarding Filing of Tariffs for Mobile Service*, 53 F.C.C.2d 579 (May, 1975); Memorandum Opinion and Order, *In the Matter of Petition for Reconsideration of Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorization*, FCC 84-187, BC Docket No. 82-536, 98 F.C.C.2d 792, 805 (rel. May, 1984); Declaratory Ruling, *In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Report No. CL-379, FCC 87-163, 2 FCC Rcd 2910, 2910, (rel. May, 1987); Memorandum Opinion and Order, *In the Matter of MTS and WATS Market Structure*, CC Docket No. 78-72, FCC 84-36, Phase I, 97 F.C.C.2d 834, 882-83 (rel. Feb. 1984). Mobile radio services were also "exchange telecommunications services" within the

alleging or proving that this is not LEC activity (which it is in any event). They have to show that Virtual CO Code service is not part of "exchange service" which includes more than just those things that fall only within "LEC" functions. They have come nowhere close.

If the ISP is not purchasing a "telephone toll service" from an IXC, then § 251(g) cannot even arguably apply. This traffic is "subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2)"[28] because it is related to an "exchange service."[29]

IV. Even if access somehow applies the ISP is the access customer because the two LECs are engaged in jointly provided access.

Virtual CO Code service is not "telephone toll service" and the Virtual CO Code service provider is not an IXC for purposes of rule 69.5. If there is "access" as part of this arrangement then the two carriers are each acting as joint access providers and they must each follow the access rules and their tariffs. Neither of them can deem the other to be an "access customer" or unilaterally send an access bill to the other. Since the only remotely available access arrangement is Feature Group A, then Blue Casa is the entity that should send the access bill, as shown below.

Given that ISPs are exempt from access charges the amount Blue Casa can invoice the ISP for Blue Casa's share of the jointly provided access is zero.

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meaning of section II(D)(3) of the AT&T divestiture decree. *U.S. v. AT&T*, Civil Action No. 82-0192, Misc. No. 82-0025 (PI), 578 F. Supp. 643, 645 (D.D.C., November 1, 1983).

[28] *Order Answering Mandamus* ¶ 16.

[29] @ Communications also contends that it is also either "telephone exchange service" or "exchange access service." If it is the former then it squarely falls under § 251(b)(5). If it is the latter then it is jointly provided access and each of the LECs are required to independently recover their access entitlement from an "access customer." Neither of the LECs is the "access customer" of the other. What Blue Casa is trying to obtain is a return to "Single Company Billing" which was prohibited in 1984. *See*, Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, 97 FCC 2d 1082, 1176 (1984); Memorandum Opinion and Order, *In the Matter of Waiver of Access Billing Requirements and Investigation of Permanent Modifications*, CC Docket No. 86-104, FCC 87-252, 2 FCC Rcd 4518 (rel. Jul. 1987).

VI. Even if access applies, then the "closest" (but still inapplicable) access arrangement that is involved is Feature Group A and under Commission rules and most tariffs the originating LEC (Blue Casa) would be providing the open end of the "FX." Blue Casa would therefore be the billing company and send the bill – to the ISP and not the LEC – and the two LECs would then share the zero revenues.

We return more or less to where we started. If this is access, then the Commission's access regime – as it existed in 1996 – is what controls. If this is "FX" then it is Feature Group A. None of the existing Feature Groups truly apply – and even Feature Group A does not apply because Blue Casa is not the one providing the number and there is no dedicated circuit – but if we have to shoehorn this into one of the existing Feature Groups, then it can only be Feature Group A since that is the arrangement the FCC created for "FX."

We also return to the NECA tariff.[30]

> 5.3.1 Non Meet Point Billing Ordering - FGA
> (A) Single Company Billing Ordering
> The Telephone Company receiving the order from the customer will arrange to provide the service and bill the customer as set forth in 2.4.7(A)(1). The customer will place the order with the Telephone Company as follows: For FGA Switched Access Service the customer will place the order with the Telephone Company in whose territory the first point of switching is located. The first point of switching is the dial tone office.[31] When the first point of switching is not in the same Telephone Company's territory as the Interexchange Carrier premises, the customer must supply a copy of the order to the Telephone Company in whose territory the Interexchange Carrier premises is located and any other Telephone Company(s) involved in providing the service. When service is provided through a centralized equal access provider, the customer must supply a copy of the order to that provider.
>
> …
>
> 2.4.7 Access Services Provided by More Than One Telephone Company
> (A) Non Meet Point Billing/Feature Group A (Cont'd)

[30] The NECA tariff provisions quoted below are presented out of sequential order for clarity.

[31] The "dial tone office" and the "open end" is Blue Casa's switch, because – even though it is not a good fit – that is incontrovertibly the only possible "first point of switching" when Blue Casa's telephone exchange service users have their modem dial the ISP's assigned phone number when they want to get on the Internet. The ISP receives only inbound service from the Virtual CO code provider (indeed, often the ISDN-PRI service they contract to receive expressly says it is inbound only and the ISP's system cannot even make an outbound call). The ISP's system may never experience a "dial tone" of any sort, particularly since this is usually an ISDN-PRI based service.

> (1) Single Company Billing/Revenue Sharing. All Telephone Companies jointly providing Feature Group A service will receive an order or a copy of the order, from the customer, as specified in 5.3.1(A) following. The telephone company that provides the dial tone will arrange to provide the service, determine the applicable charges and bill the customer for the entire service in accordance with its Access Services tariff as provided for under a Feature Group A Revenue Sharing Agreement.

It quickly becomes apparent if Blue Casa is right the entire industry has been doing it wrong ever since this offering was created after the 1996 amendments. The ISP was supposed to order Feature Group A service from Blue Casa. And then Blue Casa is supposed to bill the ISP and remit some of the money to the CLEC that actually connects to the ISP. Somehow we all forgot to do that Feature Group A revenue sharing agreement. Any order in this case should require us to do so and then when the negotiations for the FCC-required separate voluntarily negotiated[32] access revenue sharing agreements fail (as they surely will) it will be necessary to amend the tariffs to cover all of this activity for the very first time.

The Commission will end up having to order access tariff amendments to govern this activity if this is somehow deemed to be access. But that means nothing in place today in LEC access tariffs governs it today, and there was nothing in place that did so in 1996. Since access tariffs are the means by which § 251(g) activity is administered there can be no clearer indication that Virtual CO code based services were not carved out by § 251(g), and therefore § 251(b)(5) applies.

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[32] *See*, MO&O, *In the Matter of Access Billing Requirements for Joint Service Provision*, CC Docket No. 87-579, DA 89-1251, ¶ 23, 4 FCC Rcd 7183 (Com. Car. Bur., October 5, 1989) ["23. The Bureau agrees with the OBF recommendation that LECs which are jointly providing FGA service should enter into revenue-sharing agreements. We do not believe, however, that it would be appropriate either to disturb those revenue-sharing agreements already in existence or to establish guidelines for new agreements to be negotiated as a result of this Order. BellSouth is correct in noting that the Commission has declined past requests to establish guidelines for these agreements, and we believe it is best to continue that practice. The Bureau does, however, urge LECs to negotiate in good faith and to establish access rates that are designed to recover both the primary and secondary exchange carriers' costs."]

CONCLUSION

Blue Casa is not really seeking a declaration that the access regime as it existed in 1996 covered Virtual CO code service by LECs and required the LEC that provides Virtual CO codes service to an ISP to be an access tariff customer of the originating LEC. The access regime is and has always been implemented through access tariffs and none of the Commission's access charge orders and no Commission-approved access tariff can remotely be interpreted to allow the originating LEC to send an access bill to the other LEC. There is not a single feature group that describes the technical arrangement between the two LECs. In fact, the tariffs themselves make it clear that *if* this is access at all (which it is not) then it is jointly-provided access and the access customer is the ISP. But, of course, ISPs are "access-exempt."

Blue Casa and the ILECs that will likely support the petition are not asking for a declaration that their existing access tariffs apply, for they simply do not. What they are really seeking is a ruling they can use to incorporate terms into §§ 251/252 ICAs that substitute access prices rather than § 251(b)(5) (or more properly § 252(d)(2) cost-based) prices for originating end office switching and common transport. Or they are asking for permission to amend their tariffs to cover this activity for the first time.

But this activity was never covered by the access regime before or after 1996, since no Commission-approved access tariff describes this arrangement and provides rates for it.

Blue Casa has not carried its burden of proof and it cannot ever carry its burden. The facts do not support the petition and the law squarely says no.

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